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TITLE 26--INTERNAL REVENUE CODE

Subtitle A--Income Taxes

CHAPTER 1--NORMAL TAXES AND SURTAXES

Subchapter B--Computation of Taxable Income

PART III--ITEMS SPECIFICALLY EXCLUDED FROM GROSS INCOME

Sec. 125. Cafeteria plans

(a) General rule

Except as provided in subsection (b), no amount shall be included in the gross income of a participant in a cafeteria plan solely because, under the plan, the participant may choose among the benefits of the plan.

(b) Exception for highly compensated participants and key employees

(1) Highly compensated participants

In the case of a highly compensated participant, subsection (a) shall not apply to any benefit attributable to a plan year for which the plan discriminates in favor of--

(A) highly compensated individuals as to eligibility to participate, or

(B) highly compensated participants as to contributions and benefits.

(2) Key employees

In the case of a key employee (within the meaning of section 416(i)(1)), subsection (a) shall not apply to any benefit attributable to a plan for which the statutory nontaxable benefits provided to key employees exceed 25 percent of the aggregate of such benefits provided for all employees under the plan. For purposes of the preceding sentence, statutory nontaxable benefits shall be determined without regard to the last sentence of subsection (f).

(3) Year of inclusion

For purposes of determining the taxable year of inclusion, any benefit described in paragraph (1) or (2) shall be treated as received or accrued in the taxable year of the participant or key employee in which the plan year ends.

(c) Discrimination as to benefits or contributions

For purposes of subparagraph (B) of subsection (b)(1), a cafeteria plan does not discriminate where qualified benefits and total benefits (or employer contributions allocable to qualified benefits and employer contributions for total benefits) do not discriminate in favor of highly compensated participants.

(d) Cafeteria plan defined

For purposes of this section--

(1) In general

The term ``cafeteria plan'' means a written plan under which--

- (A) all participants are employees, and
- (B) the participants may choose among 2 or more benefits consisting of cash and qualified benefits.

(2) Deferred compensation plans excluded

(A) In general

The term ``cafeteria plan'' does not include any plan which provides for deferred compensation.

(B) Exception for cash and deferred arrangements

Subparagraph (A) shall not apply to a profit-sharing or stock bonus plan or rural cooperative plan (within the meaning of section 401(k)(7)) which includes a qualified cash or deferred arrangement (as defined in section 401(k)(2)) to the extent of amounts which a covered employee may elect to have the employer pay as contributions to a trust under such plan on behalf of the employee.

(C) Exception for certain plans maintained by educational institutions

Subparagraph (A) shall not apply to a plan maintained by an educational organization described in section 170(b)(1)(A)(ii) to the extent of amounts which a covered employee may elect to have the employer pay as contributions for post-retirement group

life insurance if--

- (i) all contributions for such insurance must be made before retirement, and
- (ii) such life insurance does not have a cash surrender value at any time.

For purposes of section 79, any life insurance described in the preceding sentence shall be treated as group-term life insurance.

(e) Highly compensated participant and individual defined

For purposes of this section--

(1) Highly compensated participant

The term ``highly compensated participant'' means a participant who is--

- (A) an officer,
- (B) a shareholder owning more than 5 percent of the voting power or value of all classes of stock of the employer,
- (C) highly compensated, or
- (D) a spouse or dependent (within the meaning of section 152) of an individual described in subparagraph (A), (B), or (C).

(2) Highly compensated individual

The term ``highly compensated individual'' means an individual who is described in subparagraphs \1\ (A), (B), (C), or (D) of paragraph (1).

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\1\ So in original. Probably should be ``subparagraph''.

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(f) Qualified benefits defined

For purposes of this section, the term ``qualified benefit'' means any benefit which, with the application of subsection (a), is not includible in the gross income of the employee by reason of an express provision of this chapter (other than section 106(b), 117, 127, or 132). Such term includes any group term life insurance which is includible in gross income only because it exceeds the dollar limitation of section 79 and such term includes any other benefit permitted under regulations. Such term shall not include any product which is advertised, marketed, or offered as long-term care insurance.

(g) Special rules

(1) Collectively bargained plan not considered
discriminatory

For purposes of this section, a plan shall not be treated as discriminatory if the plan is maintained under an agreement which the Secretary finds to be a collective bargaining agreement between employee representatives and one or more employers.

(2) Health benefits

For purposes of subparagraph (B) of subsection (b)(1), a cafeteria plan which provides health benefits shall not be treated as discriminatory if--

(A) contributions under the plan on behalf of each participant include an amount which--

(i) equals 100 percent of the cost of the health benefit coverage under the plan of the majority of the highly compensated participants similarly situated, or

(ii) equals or exceeds 75 percent of the cost of the health benefit coverage of the participant (similarly situated) having the highest cost health benefit coverage under the plan, and

(B) contributions or benefits under the plan in excess of those described in subparagraph (A) bear a uniform relationship to compensation.

(3) Certain participation eligibility rules not treated as
discriminatory

For purposes of subparagraph (A) of subsection (b)(1), a classification shall not be treated as discriminatory if the plan--

(A) benefits a group of employees described in section 410(b)(2)(A)(i), and

(B) meets the requirements of clauses (i) and (ii):

(i) No employee is required to complete more than 3 years of employment with the employer or employers maintaining the plan as a condition of participation in the plan, and the employment requirement for each employee is the same.

(ii) Any employee who has satisfied the employment requirement of clause (i) and who is otherwise entitled to participate in the plan commences participation no later than the first day of the first plan year beginning after the date the employment requirement was satisfied unless the employee was separated from service before the first day of that plan year.

(4) Certain controlled groups, etc.

All employees who are treated as employed by a single employer under subsection (b), (c), or (m) of section 414 shall be treated as employed by a single employer for purposes of this section.

(h) Cross reference

For reporting and recordkeeping requirements, see section 6039D.

(i) Regulations

The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section.

(Added Pub. L. 95-600, title I, Sec. 134(a), Nov. 6, 1978, 92 Stat. 2783; amended Pub. L. 96-222, title I, Sec. 101(a)(6)(A), Apr. 1, 1980, 94 Stat. 196; Pub. L. 96-605, title II, Secs. 201(b)(2), 226(a), Dec. 28, 1980, 94 Stat. 3527, 3529; Pub. L. 96-613, Sec. 5(b)(2), Dec. 28, 1980, 94 Stat. 3581; Pub. L. 98-369, div. A, title V, Sec. 531(b)(1)-(4)(A), July 18, 1984, 98 Stat. 881, 882; Pub. L. 98-611, Sec. 1(d)(3)(A), Oct. 31, 1984, 98 Stat. 3177; Pub. L. 98-612, Sec. 1(b)(3)(B), Oct. 31, 1984, 98 Stat. 3181; Pub. L. 99-514, title XI, Sec. 1151(d)(1), title XVIII, Sec. 1853(b)(1), Oct. 22, 1986, 100 Stat. 2504, 2870; Pub. L. 100-647, title I, Secs. 1011B(a)(11)-(13), 1018(t)(6), title IV, Sec. 4002(b)(2), title VI, Sec. 6051(b), Nov. 10, 1988, 102 Stat. 3484, 3485, 3589, 3643, 3696; Pub. L. 101-140, title II, Sec. 203(a)(1), (3), (b)(2), Nov. 8, 1989, 103 Stat. 830, 831; Pub. L. 101-239, title VII, Sec. 7814(b), Dec. 19, 1989, 103 Stat. 2413; Pub. L. 101-508, title XI, Sec. 11801(c)(3), Nov. 5, 1990, 104 Stat. 1388-523; Pub. L. 104-191, title III, Secs. 301(d), 321(c)(1), Aug. 21, 1996, 110 Stat. 2051, 2058.)

Codification

Pub. L. 101-140, Sec. 203(a)(1), amended this section to read as if the amendments made by section 1151(d)(1) of Pub. L. 99-514 (amending this section generally) had not been enacted. Subsequent to amendment by Pub. L. 99-514, this section was amended by Pub. L. 100-647 and Pub. L. 101-239. See 1989 and 1988 Amendment notes below.

Prior Provisions

A prior section 125 was renumbered section 139 of this title.

Amendments

1996--Subsec. (f). Pub. L. 104-191, Sec. 321(c)(1), inserted at end

``Such term shall not include any product which is advertised, marketed, or offered as long-term care insurance.''

Pub. L. 104-191, Sec. 301(d), inserted ``106(b),' ' before ``117' '.

1990--Subsec. (f). Pub. L. 101-508 substituted ``section 117,' ' for ``section 117, 124,' '.

1989--Pub. L. 101-140, Sec. 203(a)(1), amended section to read as if amendments by Pub. L. 99-514, Sec. 1151(d)(1), had not been enacted, see 1986 Amendment note below.

Subsec. (d)(2). Pub. L. 101-140, Sec. 203(b)(2), amended par. (2) generally. Prior to amendment, par. (2) read as follows: ``The term `cafeteria plan' does not include any plan which provides for deferred compensation. The preceding sentence shall not apply in the case of a profit-sharing or stock bonus plan which includes a qualified cash or deferred arrangement (as defined in section 401(k)(2)) to the extent of amounts which a covered employee may elect to have the employer pay as contributions to a trust under such plan on behalf of the employee.''

Subsec. (e)(2)(A). Pub. L. 101-239 substituted ``includible only because' ' for ``includable only because' ', see Codification note above.

Subsec. (g)(3)(A). Pub. L. 101-140, Sec. 203(a)(3), substituted ``section 410(b)(2)(A)(i)' ' for ``subparagraph (B) of section 410(b)(1)' '.

1988--Subsec. (a). Pub. L. 100-647, Sec. 1011B(a)(11)(A), amended subsec. (a) generally, see Codification note above. Prior to amendment, subsec. (a) read as follows: ``In the case of a cafeteria plan--

``(1) amounts shall not be included in gross income of a participant in such plan solely because, under the plan, the participant may choose among the benefits of the plan, and

``(2) if the plan fails to meet the requirements of subsection (b) for any plan year--

``(A) paragraph (1) shall not apply, and

``(B) notwithstanding any other provision of part III of this subchapter, any qualified benefits received under such cafeteria plan by a highly compensated employee for such plan year shall be included in the gross income of such employee for the taxable year with or within which such plan year ends.''

Subsec. (b)(1). Pub. L. 100-647, Sec. 1011B(a)(11)(B), substituted ``In the case of a highly compensated employee, subsection (a) shall not apply to any benefit attributable to a plan year' ' for ``A plan shall be treated as failing to meet the requirements of this subsection' ', see Codification note above.

Subsec. (b)(2). Pub. L. 100-647, Sec. 1011B(a)(11)(C), substituted ``subsection (a) shall not apply to any plan year' ' for ``a plan shall be treated as failing to meet the requirements of this subsection' ' in first sentence, see Codification note above.

Pub. L. 100-647, Sec. 1011B(a)(13)(B), substituted ``shall not include benefits which (without regard to this paragraph) are includible in gross income' ' for ``shall be determined without regard to the last sentence of subsection (e)' ', see Codification note above.

Subsec. (c)(1)(B). Pub. L. 100-647, Sec. 1011B(a)(12), amended subpar. (B) generally, see Codification note above. Prior to amendment,

subpar. (B) read as follows: ``the participants may choose--

``(i) among 2 or more benefits consisting of cash and qualified benefits, or

``(ii) among 2 or more qualified benefits.''

Subsec. (c)(2)(B). Pub. L. 100-647, Sec. 1018(t)(6), inserted ``or rural electric cooperative plan (within the meaning of section 401(k)(7))'' after ``stock bonus plan'', see Codification note above.

Subsec. (c)(2)(C). Pub. L. 100-647, Sec. 6051(b), inserted at end ``In applying section 89 to a plan described in this subparagraph, contributions under the plan shall be tested as of the time the contributions were made.'', see Codification note above.

Subsec. (e)(1). Pub. L. 100-647, Sec. 1011B(a)(13)(A), inserted ``and without regard to section 89(a)'' after ``subsection (a)'' , see Codification note above.

Subsec. (e)(2)(A). Pub. L. 100-647, Sec. 4002(b)(2), inserted ``or any insurance under a qualified group legal services plan the value of which is so includable only because it exceeds the limitation of section 120(a)'' after ``section 79'', see Codification note above.

1986--Pub. L. 99-514, Sec. 1151(d)(1), amended section generally, revising and restating as subsecs. (a) to (g) provisions of former subsecs. (a) to (i) so as to coincide with the coming into effect of section 89 of this title.

Subsecs. (c), (d)(1)(B). Pub. L. 99-514, Sec. 1853(b)(1)(A), substituted ``qualified benefits'' for ``statutory nontaxable benefits'' wherever appearing.

Subsec. (f). Pub. L. 99-514, Sec. 1853(b)(1)(B), substituted ``Qualified benefits defined'' for ``Statutory nontaxable benefits defined'' in heading and amended text generally. Prior to amendment, text read as follows: ``For purposes of this section, the term 'statutory nontaxable benefit' means any benefit which, with the application of subsection (a) is not includible in the gross income of the employee by reason of an express provision of this chapter (other than section 117, 124, 127, or 132). Such term includes any group term life insurance which is includible in gross income only because it exceeds the dollar limitation of section 79.''

1984--Subsec. (b). Pub. L. 98-369, Sec. 531(b)(3), amended subsec. (b) generally, substituting ``and key employees'' for ``where plan is discriminatory'' in heading and ``Highly compensated participants'' for ``In general'' in par. (1) heading, adding par. (2), redesignating former par. (2) as (3), and inserting therein references to par. (2) and to taxable year of key employee.

Subsec. (c). Pub. L. 98-369, Sec. 531(b)(2)(B), inserted ``statutory'' before ``nontaxable benefits'' in two places.

Subsec. (d)(1). Pub. L. 98-369, Sec. 531(b)(1), substituted ``among 2 or more benefits consisting of cash and statutory nontaxable benefits'' for ``among two or more benefits'' in cl. (B) and struck out ``The benefits which may be chosen may be nontaxable benefits, or cash, property, or other taxable benefits.''

Subsec. (f). Pub. L. 98-369, Sec. 531(b)(2)(A), amended subsec. (f) generally, inserting ``Statutory'' in heading and ``statutory'' before

``nontaxable benefit'' in text, providing that the benefit be excluded by reason of an express provision of this chapter (other than section 117, 124, 127, or 132), and extending the benefit to include group term life insurance.

Subsec. (h). Pub. L. 98-611 and Pub. L. 98-612, made identical amendments, substituting cross reference provision for reporting requirements provisions.

Pub. L. 98-369, Sec. 531(b)(4)(A), added subsec. (h) relating to reporting requirements provisions. Former subsec. (h) redesignated (i).

Subsec. (i). Pub. L. 98-369, Sec. 531(b)(4)(A), redesignated subsec. (h) as (i).

1980--Subsec. (d)(2). Pub. L. 96-605, Sec. 226(a), inserted provision that the sentence excluding deferred compensation plans not apply in the case of a profit-sharing or stock bonus plan which includes a qualified cash or deferred arrangement, as defined in section 401(k)(2) to the extent of amounts which a covered employee may elect to have the employer pay as contributions to a trust under such plan on behalf of the employee.

Subsec. (g)(3)(B). Pub. L. 96-222 substituted ``employment requirement'' for ``service requirement'' in cls. (i) and (ii).

Subsec. (g)(4). Pub. L. 96-613, Sec. 5(b)(2), and Pub. L. 96-605, Sec. 201(b)(2), made identical amendments by substituting ``controlled groups, etc.'' for ``controlled groups'' in heading, and by substituting ``subsection (b), (c), or (m) of section 414'' for ``subsection (b) or (c) of section 414'' in text.

Effective Date of 1996 Amendment

Amendment by section 301(d) of Pub. L. 104-191 applicable to taxable years beginning after Dec. 31, 1996, see section 301(j) of Pub. L. 104-191, set out as a note under section 62 of this title.

Amendment by section 321(c)(1) of Pub. L. 104-191 applicable to contracts issued after Dec. 31, 1996, see section 321(f) of Pub. L. 104-191, set out as an Effective Date note under section 7702B of this title.

Effective Date of 1989 Amendments

Amendment by Pub. L. 101-239 effective, except as otherwise provided, as if included in the provision of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, to which such amendment relates, see section 7817 of Pub. L. 101-239, set out as a note under section 1 of this title.

Amendment by Pub. L. 101-140 effective as if included in section 1151 of Pub. L. 99-514, see section 203(c) of Pub. L. 101-140, set out as a note under section 79 of this title.

Effective Date of 1988 Amendment

Amendment by sections 1011B(a)(11)-(13) and 1018(t)(6) of Pub. L. 100-647 effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99-514, to which such amendment relates, see section 1019(a) of Pub. L. 100-647, set out as a note under section 1 of this title.

Amendment by section 4002(b)(2) of Pub. L. 100-647 applicable to taxable years ending after Dec. 31, 1987, see section 4002(c) of Pub. L. 100-647, set out as a note under section 120 of this title.

Section 6051(c) of Pub. L. 100-647 provided that: ``The amendments made by this section [amending this section and section 89 of this title] shall take effect as if included in the amendments made by section 1151 of the Reform Act [Pub. L. 99-514, see Effective Date of 1986 Amendment note set out under section 79 of this title].''

Effective Date of 1986 Amendment

Amendment by section 1151(d)(1) of Pub. L. 99-514 applicable, with certain qualifications and exceptions, to years beginning after Dec. 31, 1988, see section 1151(k) of Pub. L. 99-514, as amended, set out as a note under section 79 of this title.

Amendment by section 1853(b)(1) of Pub. L. 99-514 effective, except as otherwise provided, as if included in the provisions of the Tax Reform Act of 1984, Pub. L. 98-369, div. A, to which such amendment relates, see section 1881 of Pub. L. 99-514, set out as a note under section 48 of this title.

Effective Date of 1984 Amendments

Amendment by Pub. L. 98-612 effective Jan. 1, 1985, see section 1(d)(2) of Pub. L. 98-612.

Amendment by Pub. L. 98-611 effective Jan. 1, 1985, see section 1(g)(2) of Pub. L. 98-611, set out as a note under section 127 of this title.

Amendment by Pub. L. 98-369 effective Jan. 1, 1985, see section 531(h) of Pub. L. 98-369, set out as an Effective Date note under section 132 of this title.

Effective Date of 1980 Amendments

Amendments by section 201(b)(2) of Pub. L. 96-605 and section 5(b)(2) of Pub. L. 96-613 applicable to years ending after Nov. 30, 1980, except in the case of a plan in existence on Nov. 30, 1980 where amendments by section 201(b)(2) of Pub. L. 96-605 and section 5(b)(2) of Pub. L. 96-613 applicable to plan years beginning after Nov. 30, 1980, see section 201(c) of Pub. L. 96-605 and section 5(c) of Pub. L. 96-613,

set out as a note under section 414 of this title.

Section 226(b) of Pub. L. 96-605 provided that: ``The amendment made by subsection (a) [amending this section] shall apply with respect to taxable years beginning after December 31, 1980.''

Amendment by Pub. L. 96-222 effective, except as otherwise provided, as if it had been included in the provisions of the Revenue Act of 1978, Pub. L. 95-600, to which such amendment relates, see section 201 of Pub. L. 96-222, set out as a note under section 32 of this title.

Effective Date of 1978 Amendment

Section 134(c) of Pub. L. 95-600, as amended by Pub. L. 96-222, title I, Sec. 101(a)(6)(B), Apr. 1, 1980, 94 Stat. 197, provided that: ``The amendments made by this section [enacting this section] shall apply to plan years beginning after December 31, 1978.''

Savings Provision

For provisions that nothing in amendment by Pub. L. 101-508 be construed to affect treatment of certain transactions occurring, property acquired, or items of income, loss, deduction, or credit taken into account prior to Nov. 5, 1990, for purposes of determining liability for tax for periods ending after Nov. 5, 1990, see section 11821(b) of Pub. L. 101-508, set out as a note under section 29 of this title.

Nonenforcement of Amendment Made by Section 1151 of Pub. L. 99-514 for Fiscal Year 1990

No monies appropriated by Pub. L. 101-136 to be used to implement or enforce section 1151 of Pub. L. 99-514 or the amendments made by such section, see section 528 of Pub. L. 101-136, set out as a note under section 89 of this title.

Treatment of Pre-1989 Elections for Dependent Care Assistance Under Cafeteria Plans

Section 6063 of Pub. L. 100-647 provided that: ``For purposes of section 125 of the 1986 Code, a plan shall not be treated as failing to be a cafeteria plan solely because under the plan a participant elected before January 1, 1989, to receive reimbursement under the plan for dependent care assistance for periods after December 31, 1988, and such assistance is includible in gross income under the provisions of the Family Support Act of 1988 [Pub. L. 100-485, see Tables for classification].''

For provision that for purposes of section 125 of the Internal

Revenue Code of 1986, a plan shall not be treated as failing to be a cafeteria plan solely because under the plan a participant elected before January 1, 1988, to receive reimbursement under the plan for dependent care assistance for periods after December 31, 1987, and such assistance included reimbursement for expenses at a camp where the dependent stays overnight, see section 10101(b)(2) of Pub. L. 100-203, as added by Pub. L. 100-647, set out as an Effective Date of 1987 Amendment note under section 21 of this title.

Exception for Certain Cafeteria Plans and Benefits

Section 531(b)(5) of Pub. L. 98-369, as amended by Pub. L. 99-514, title XVIII, Sec. 1853(b)(2), (3), Oct. 22, 1986, 100 Stat. 2870, 2871, provided that:

``(A) General transitional rule.--Any cafeteria plan in existence on February 10, 1984, which failed as of such date and continued to fail thereafter to satisfy the rules relating to section 125 under proposed Treasury regulations, and any benefit offered under such a cafeteria plan which failed as of such date and continued to fail thereafter to satisfy the rules of section 105, 106, 120, or 129 under proposed Treasury regulations, will not fail to be a cafeteria plan under section 125 or a nontaxable benefit under section 105, 106, 120, or 129 solely because of such failures. The preceding sentence shall apply only with respect to cafeteria plans and benefits provided under cafeteria plans before the earlier of--

``(i) January 1, 1985, or

``(ii) the effective date of any modification to provide additional benefits after February 10, 1984.

``(B) Special transition rule for advance election benefit banks.--Any benefit offered under a cafeteria plan in existence on February 10, 1984, which failed as of such date and continued to fail thereafter to satisfy the rules of section 105, 106, 120, or 129 under proposed Treasury regulations because an employee was assured of receiving (in cash or any other benefit) amounts available but unused for covered reimbursement during the year without regard to whether he incurred covered expenses, will not fail to be a nontaxable benefit under such applicable section solely because of such failure. The preceding sentence shall apply only with respect to benefits provided under cafeteria plans before the earlier of--

``(i) July 1, 1985, or

``(ii) the effective date of any modification to provide additional benefits after February 10, 1984.

Except as provided in Treasury regulations, the special transition rule is available only for benefits with respect to which, after December 31, 1984, contributions are fixed before the period of coverage and taxable cash is not available until the end of such period of coverage.

``(C) Plans for which substantial implementation costs were incurred.--For purposes of this paragraph, any plan with respect to which substantial implementation costs had been incurred before February

10, 1984, shall be treated as in existence on February 10, 1984.

``(D) Collective bargaining agreements.--In the case of any cafeteria plan in existence on February 10, 1984, and maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers, the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof agreed to after July 18, 1984) shall be substituted for `January 1, 1985' in subparagraph (A) and for `July 1, 1985' in subparagraph (B). For purposes of the preceding sentence, any plan amendment made pursuant to a collective bargaining agreement relating to the plan which amends the plan solely to conform to any requirement added by this section (or any requirement in the regulations under section 125 of the Internal Revenue Code of 1954 [now 1986] proposed on May 6, 1984) shall not be treated as a termination of such collective bargaining agreement.

``(E) Special rule where contributions or reimbursements suspended.--For purposes of subparagraphs (A) and (B), a plan shall not be treated as not continuing to fail to satisfy the rules referred to in such subparagraphs with respect to any benefit provided in the form of a flexible spending arrangement merely because contributions or reimbursements (or both) with respect to such plan were suspended before January 1, 1985.''

Section Referred to in Other Sections

This section is referred to in sections 79, 403, 414, 415, 3121, 3306, 6039D, 7701 of this title; title 42 section 409.